

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL KELLY,

Plaintiff-Appellant,

v

GLORIA JACKSON,

Defendant-Appellee.

UNPUBLISHED
February 10, 2004

No. 243215
Wayne Circuit Court
LC No. 02-206313-CH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order dismissing his action to quiet title. This appeal is being decided without oral argument, pursuant to MCR 7.214(E). We affirm.

Plaintiff filed this action to quiet title to property purchased at a tax sale for which he had received a tax deed. Plaintiff moved for entry of judgment, and defendant maintained that she had not been properly served with notice of the tax sale. The deputy sheriff who completed the proof of service testified that he had no independent recollection of making the service. Plaintiff asserted that she was at school at the time she was purportedly served, and she had never seen the deputy who testified.

On appeal, plaintiff argues that the trial court abused its discretion in dismissing the cause of action without allowing him to conduct discovery. However, where plaintiff failed to make discovery requests before filing his motion, there is no showing that the trial court abused its discretion. *Nuriel v YWCA of Metropolitan Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990).

Plaintiff asserts that the court clearly erred in finding that notice was not served on defendant. A finding is clearly erroneous when the Court is left with a definite and firm conviction that a mistake has been committed. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). While the deputy's testimony could have been sufficient to show that defendant had been served, it did not compel that conclusion. The deputy had no independent recollection of having served defendant. He only gave minimal testimony about his usual practices. He did not recall ever seeing defendant before the hearing. Defendant testified that she had never seen the deputy before, and she was not home at the time service was indicated because she was teaching a class. The trial court had the opportunity to observe both

witnesses, and there is no showing that the court clearly erred in finding defendant credible. MCR 2.613(C).

Finally, plaintiff maintains that the trial court erred in considering equity in deciding this case. Equity should not be a consideration in determining whether notice was served. While the court appeared to be sympathetic to defendant's situation, it based its decision on legal grounds, and there is no clear indication that it made its decision on equitable grounds.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood